# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 73-1712

LOCAL 445, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

*v.*

SPERRY SYSTEMS MANAGEMENT DIVISION, SPERRY RAND CORP.

AND

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Upon an unfair labor practice complaint filed by the Company, the Board (with Members Kennedy and Penello dissenting) held that the Union did not violate Section 8(b)(3) of the National Labor Relations Act, 29 U.S.C. 158(b)(3),[1] by insisting that the Company comply with an arbitration award directing it to apply the wage and other non-representational provisions of the bargaining agreement between the Company and the

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[1] Section 8(b)(3) makes it an unfair labor paractice for a union "to refuse to bargain collectively with an employer * * * ."

Union, covering the technical employees at the Company's New York City plants, to certain unrepresented technical employees at the Company's California facility (Pet. App. C1-C13). This conclusion rested on the Board's findings that: (1) the arbitrator's ruling that application of the contract's work preservation clause to all Company facilities where unit work was performed was not clearly repugnant to the Act; (2) the Union had invoked the clause and had sought compliance with the resulting arbitration award for legitimate work-preservation reasons, and not to achieve unlawful recognition for the California employees; and (3) the Union's actions had not disrupted the bargaining relationship in the New York unit (Pet. App. C6-C9).

The court of appeals vacated the Board's dismissal of the complaint and remanded the case for further proceedings (Pet. App. A1-A14). The court found, contrary to the Board, that "the Union's activities in enforcing the award must be characterized as a *sub rosa* attempt to gain the *de facto* representation of the [California] employees," which it failed to gain through an earlier Board election (Pet. App. A11). The court further found that the operation of the California facility did not "vitally affect" the New York unit, and that thus, regardless of the Union's motive, its demand that the New York contract be applied to the California employees was not a permissible subject of bargaining in the New York unit (Pet. App. A11-A14). Accordingly, the court concluded that the Union's attempts to secure compliance with the arbitration award violated Section 8(b)(3) of the Act.

2. The court's rejection of the Board's position turns largely on its differing appraisal of the facts of this particular case. Thus, the court, like the two dissenting

Board Members, found that the dominant thrust of the Union's actions was to secure recognition as the representative of the California employees. Moreover, the court found that, on the facts of this case, the terms of employment for the California employees did not "vitally affect [those of] the unit employees." While the Board believes that its findings are supported by substantial evidence and should have been sustained by the court of appeals, the court's failure to do so presents essentially only an evidentiary issue, which is not appropriate for further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490; *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 410. The petition should therefore be denied.

Respectfully submitted.

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PETER G. NASH,
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*National Labor Relations Board.*

SEPTEMBER 1974.

DOJ-1974-09